IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 216 of 1997

For Approval and Signature:

HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

BABAR MAHESH DHIRUBHAI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 216 of 1997
NANAVATY ADVOCATES for Appellant
MR AJ DESAI, APP for Respondent

CORAM : HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 01/04/2004

ORAL JUDGEMENT (Per : HON'BLE MR.JUSTICE J.R.VORA)

1. This Appeal is preferred by accused Babar Mahesh Dhirubhai of Session Case No. 17 of 1996 of the Court of Sessions at Junagadh against the judgment and order delivered by learned Sessions Judge, Junagadh, on 15th of February, 1997 convicting the present appellant for the charges proved against him under Section 302 of the Indian Penal Code and sentencing him for life imprisonment. Learned Sessions Judge though found the accused - appellant guilty for the offence under Section 450 of the Indian Penal Code but did not award any separate sentence. The appellant accused was acquitted of the charges framed against him under Section 3(1)(15) of the Scheduled Castes & the Scheduled Tribes Prevention of Atrocities Act, 1989 for which it appears that no appeal by the State has been preferred.

2. The incident leading to the prosecution of accused appellant occurred on 24.11.1995 at about 8.00 a.m. According to prosecution case, accused - appellant is married to one Hansaben daugher of Danabhai Laxmanbhai of village Khajudra. Before one year of the incident, the marriage between the accused and Hansaben had taken place. Before the said marriage, Hansaben, wife of the accused was staying at village Khajudra with her parents. Deceased Fulsingh Mohanbhai Vasava belonged to Surat District, serving as Teacher in the village school was residing just opposite the house of Hansaben. The deceased Fulsingh Mohanbhai Vasava was residing as a tenant in the house of one Mohanbhai Darji. On account of neighbourhood, deceased was often visiting the house of Hansaben and Hansaben was also helping the deceased in preparing food and cleaning his house. However few months before Hansaben married to the appellant accused, when Holy festival was near, Hansaben went to the house of deceased Fulsingh Mohanbhai Vasava for cleaning at about 11.00 a.m. and when she was doing cleaning work, deceased Fulsingh after closing doors of the house committed rape on Hansaben. On account of apprehension that their reputation will be damaged, no complaint was filed either by Hansaben or her parents, and thereafter Hansaben married to the accused appellant. However, on first wedding night accused appellant found that his wife Hansaben had intercourse with someone before the marriage. Hansaben admitted before her husband that once the deceased Fulsingh had committed rape upon her and from that day the accused appellant was maintaining grudge against deceased Fulsingh. On the day of the incident, there was one religious procession in

neighbouring village Simar and, therefore, on earlier day, Hansaben and accused appellant both had come to Khajudra to take part in the said religious festival. On the day of the incident, the appellant accused got up early and after cleaning teeth, went to the house of deceased Fulsingh Mohanbhai Vasava. He was called by her mother-in-law Radhaben for breakfast and accused replied that he was to return immediately. Thereafter, shouts were heard and when mother-in-law of the accused Radhaben came out, she found that the accused was coming out of the house of the deceased running and got in their house. The deceased was shouting and came out from the doors abutting to the road and after going some distance ahead on the road had fallen down. He was smeared with blood. At that time, Rama Jodha, PW-12 and Kanabhai Polabhai, PW-5 who were standing at the cabin of Pancha Manda came and noticed that the accused was running towards the house of Danabhai from the house of the deceased. Some students of the village school informed about the incident to the Headmaster PW-2 Manshukhgiri Umdegiri. He came to the scene of offence and thereafter he informed Sarpanch of the village Atubhai PW-11. Atubhai after coming to the scene of offence inquired about what had happened and PW-3 Danabhai, father-in-law of the appellant - accused stated that the accused appellant had injured the deceased. At that time accused - appellant was present. He was also asked by the Sarpanch Atubhai and in the presence of PW-11 Sarpanch Atubhai, accused appellant admitted that the deceased had borrowed Rs.300/- from the accused and for recovery of such amount, altercation took place and he attacked the deceased by knife. In this scuffle, the accused appellant was also injured on hips and lateral side of knee. Thereafter PW-11 Atubhai Sarpanch along with Headmaster of the School PW-2 Manshukhgiri reached Police Station and P.W.2 lodged a complaint before Una Police Station and investigation was entrusted to PW-13 Savdan Velani, PSI of Una Police Station.

3. In pursuance of the said investigation, a charge sheet came to be filed against the accused for the offences punishable as aforesaid. The case was committed to the Court of Sessions. The learned Sessions Judge, Junagadh on 20.11.1996 framed the charges against the accused for the offences punishable under Sections 450 and 302 of the IPC and punishable under Section 3(1)(15) of the Scheduled Castes & the Scheduled Tribes Prevention of Atrocities Act 1989, to which the accused pleaded not guilty.

4. The prosecution examined as many as 13 witnesses to prove the case. The first witness examined by the prosecution was Hamirbhai Kababhai, Exh.7, Medical Officer of the Community Health Centre, Una, who performed the postmortem of the deceased Fulsingh Mohanbhai Vasava and the deceased had four injuries.

(i) Stab wound on left side chest 2.5 cm x 1 c.m. x Thoracic cavity dip on the fifth inter coastal space in mid verticals line 1" below the nipple oblique place margin clean with cut direction back ward and medially.

(ii) Incised wound on Rt. sub-coastal region - size 1.5 cm x 1 c.m. x 1.5 c.m. 5 c.m. away from mid line oblique placed.

(iii) Incised wound on left sub-coastal region 5.c.m.away from mid line. size - 1 c.m. x 2 c.m. x 1 c.m.

(iv) Incised wound on left knee jt. 1.5 c.m. x 1 c.m. x 1 c.m.

According to PW-1 Dr.Hamirbhai Kababhai, there were internal injuries corresponding to external injuries. PW-1 also opined that injury number 1 was sufficient to cause death. He also opined that the cause of death is due to haemorrhage shock resulting from injury to the heart and that injury is injury No.1. PW-1 also examined accused - appellant on 24.11.1995 who had been to the Hospital along with Police Yadi and PW-1 Hamirbhai Kababhai, Medical Officer found that the accused appellant had following two injuries.

(i) Incised wound 2 c.m x 1 c.m. on Rt. thigh laterally 5" above the knee joint.

(ii) Incised wound on Rt. popliteal fossa 1.5 c.m. x 1 c.m. x 1 c.m.

In respect of the injuries of the deceased, PW-1 stated that injury could be caused by sharp cutting weapon like muddamal Article No.9 knife, while he also stated that injuries caused to the accused were also possible by sharp cutting substance.

5. Prosecution examined PW-2 Mansukhgiri vide Exh-10 as witness, who filed the complaint and was at the

relevant point of time Headmaster of the village school. He stated that on informing by some of the students of the school, he went to the scene of offence and found that teacher Fulsingh Mohanbhai Vasava had fallen on the ground and blood was oozing from his wounds. He stated that the deceased was staying 15 to 20 feet away from his house and, therefore, he informed Sarpanch Atubhai, who also came to the spot. In the presence of Sarpanch Atubhai, Danabhai Laxamanbhai, the father-in-law of the appellant - accused informed the Sarpanch that the deceased was injured by his son-in-law appellant accused. The appellant - accused was also present. He also stated that the deceased was owing Rs. 300/- from him and on demanding that amount, there was altercation between them, and as a result of that altercation, he (accused appellant) inflicted knife blows to the deceased. He filed complaint which is placed at Exh. 11. Though in his cross-examination, he admitted that the accused was under fear and therefore he informed the appellant accused that if he did not say the real story, accused was likely to be harassed by the Police. Therefore, this witness is examined for the extra judicial confession made in the presence of the appellant - accused.

6. PW-3 Exh.12 Danabhai Laxmanbhai Solanki, father-in-law of the appellant - accused, PW-4 Exh. 13 Radhaben Bhanabhai, mother-in-law of the appellant accused, PW-10 Exh.34 Hansaben, wife of the appellant accused were examined, but they have not supported the prosecution case and were declared hostile by the prosecution. While PW-5 Kanabhai Polabhai Exh.14 though examined by the prosecution for the purpose that he noticed the accused - appellant running from the house of the deceased to the house of his in-law but he turned hostile and did not support the prosecution case. Likewise PW-12 Exh. 36 Rambhai Jodhabhai also examined by the prosecution for the same fact but also has not supported the prosecution case and turned hostile. PW-6 Exh. 15 Bhupendra Maganlal and PW-7 Exh. 17 Virjibhai Dhayabhai are the panchas of panchnama of seizure of the clothes of the accused and arrest panchnama of the accused, but they have not supported either the panchnama or the prosecution case. PW-8 Exh.18 Rajabhai Rambhai and PW-9 Exh. 20 Bachubhai Meghabhai are the panchas of the scene of offence panchnama at Exh.19, but none of these witnesses has supported the prosecution case.

7. Thereafter only important witness which the prosecution examined is PW-11 Atubhai Deganbhai Exh. 35 who was Sarpanch of the village at the relevant time. He

stated in his deposition that on the day of the incident at about 9.00 a.m. Headmaster Mansukhbhai came to his house and informed that Fulsinh Mohanbhai was murdered. Therefore, he visited the scene of offence. He noticed that the deceased Fulsinh Mohanbhai was lying on road near his house and he had wounds on his chest and stomach. There were 50 to 60 persons around the scene of offence. Danabhai Laxmanbhai, father-in-law of the appellant accused was present at the scene of offence and he inquired from him that what had happened. Danabhai had replied that his son-in-law had inflicted wounds on deceased. The accused was also present at that time. Atubhai inquired from the accused also. The accused stated that the deceased owed Rs.300/- to him and on this count there were altercations between them and he inflicted knife blows. Thereafter, this witness Atubhai along with Headmaster Manushukhbhai went to Una Police Station and PW-2 Manshukhbhai lodged complaint. In his presence thereafter the Police seized bloodstain clothes and a knife from the house of the accused. He has been extensively cross-examined and an attempt is also made by the defense that the Police patel was present at that time and therefore the extrajudicial confession was before a person in authority. Witness Atubhai denied this fact and he also denied that in fact promise was given by him that if the accused stated real incident, then the Police would not harass him. He has denied the allegation that he was in habit of consuming liquor and because father-in-law of the accused was not performing his shaving, he deposed against the accused.

8. Thereafter, Investigating Officer Savdan Velani, PW-13 Exh. 37 has been examined and according to him on 24.11.1995 Manshukhbhai came to the Police Station and declared the complaint which was recorded and crime was registered. Investigation was handed over to him. The complaint was signed in his presence by the complainant. He investigated the offence and submitted the charge sheet.

9. Learned Advocate Mr. N.D. Nanavati submitted that the case hinges only on the evidence of complainant PW-2 Manshukhbhai and PW-11 Atubhai Degnabhai before whom as per the prosecution case the accused made extrajudicial confession. It was contended that PW-2 Manshukhbhai has not fully supported the prosecution case while PW-11 Atubhai is an interested witness, which is revealed from the cross-examination of the witness. It is submitted that the extrajudicial confession is the weakest piece of evidence against the accused and unless it is corroborated by other evidence, the same cannot be

relied upon. It is submitted that, therefore, the learned Trial Judge erred in convicting the accused under Section 302 of the IPC. Alternatively, it is also submitted that what is revealed from the evidence at least the offence under Section 302 of the Indian Penal Code is not proved against the accused appellant. If at all, the court comes to the conclusion that the incident is proved, then lesser offence is proved and not the offence under Section 302 of the Indian Penal Code. While learned APP Mr.A.J.Desai supported the judgment and order impugned in this Appeal.

10. True it is that, except PW-2 Manushukhgiri Umdegiri and PW-11 Atubhai, all other witnesses except, Police Witness, have not supported the prosecution case. It is also true that, the prosecution case now solely rests on the circumstantial evidence and extrajudicial confession. The learned Trial Judge after taking into consideration other circumstantial evidence of the prosecution case along with extrajudicial confession, came to convict the accused - appellant under Section 302 of the IPC.

11. Needless it is to say that extrajudicial confessions are those confessions which are made by a person elsewhere, than before Magistrate or court most probably before a private individual. There is no law that the extrajudicial confession requires corroboration and without any corroboration such piece of evidence cannot be believed. The extrajudicial confession will have to be proved like any other fact through evidence. It is not a piece of evidence which can be labelled as extra strong or extra weak and, therefore, like any other evidence, the evidence of extrajudicial confession will have to be appreciated testing the veracity of the witness to whom the same is made. The reliability of witness who gives the evidence about the extrajudicial confession would be the core question, which should be resolved by a court and come to a conclusion. But in any case, it is not open to any court to start with a presumption that extrajudicial confession is a weak type of evidence. Along with the veracity of the witness, the nature of circumstances attending to fact when confession was made, shall be relevant factor in each case to be considered by court to place reliance or discard the evidence of extrajudicial confession. When extrajudicial confession comes from the mouth of a witness who appears to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing his brought out which may tend to indicate that he may have a motive of

attributing an untruthful statement to the accused, the words spoken to by the witness are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime, then there is no impediment to place reliance on the evidence of extrajudicial confession and base conviction upon the sole evidence of extrajudicial confession. Therefore, when judicial conscious is satisfied that an extrajudicial confession is voluntary, true and made in fit state of mind by the accused, it must be relied upon. Whether or not the confession was voluntary, it depends upon the facts and circumstances of each case, to be judged in light of the evidence tendered by the prosecution. A free and voluntary confession is deserving of the highest credit because it is presumed to flow from the highest sense of guilt and involuntary confession is one which is not the result of the free will of the maker of it when the statement is made as a result of harassment and continuous interrogation after the person is treated as an offender and accused. Such statements can be regarded as involuntary.

12. When we appreciated the extrajudicial confession made by the accused before PW-2 Manushukhbhai and PW-11 Atubhai, there is no slightest doubt in our mind that the confession is voluntary, true and made by the accused in fit state of mind. Nothing is brought out against PW-2 Manushukhbhai or against PW-11 Atubhai as to why both the witnesses have to depose untrue statements to involve the accused in this heinous crime. On the contrary, we find that being Headmaster of the School, complainant Manshukhbhai and PW-11 Atubhai being Sarpanch of the village, their deposition appears to be so natural and simple that the reliance must be placed on their testimony and their say neither suffers from any infirmity nor any flaws. Though PW-2 Manushukhbhai attempted in cross-examination to twist that the statement made by the accused was not voluntary but when his evidence is appreciated along with the evidence of PW-11 Atubhai, Sarpanch of the village, it becomes clear that in material particular, Pw-2 supports the say of the PW-11 Atubhai and, therefore, we may safely conclude that the prosecution has proved the incident beyond reasonable doubt by unblemished evidence of extrajudicial confession which is found reliable on appreciation and close scrutiny of the evidence of the witnesses. Therefore, the Trial Court rightly relied upon the evidence of extrajudicial confession.

13. Now, the question is what are the facts proved by the extrajudicial confession and from the facts proved

whether the accused is guilty for committing murder of the deceased or that the accused is guilty of any other lesser offence. True it is that, when extrajudicial confession is voluntary, true and free from all infirmities, the same should be accepted, but at the same time, it must not be lost sight of that when extrajudicial confession is relied upon, the same must be relied upon in toto. Meaning thereby that while appreciating the evidence of extrajudicial confession everything i.e. whatever stated by the accused, must be taken into consideration as a whole. It would be unjust to rely upon a part of the statement and ignore the remaining part and base conviction on the part of the statement of the accused which is relied upon as extrajudicial confession. Exactly, this has happened in this case. What the Trail Court relied upon is the part of the statement of the accused that he inflicted injuries to the deceased by knife, but the part of the statement of the accused that he demanded Rs.300/- which deceased owed to him and there was altercation and scuffle and thereafter he inflicted knife blows appears to have been ignored by the Trail Court. When we take into consideration the whole statement of the accused, it clearly flows from that statement of the accused that there was scuffle between the accused and deceased as a result of altercation which resulted in inflicting of stab wounds on the body of the deceased by the accused. The court appreciating the evidence cannot lose sight of the fact that there are two more important attending circumstances in corroboration of the remaining statement of the accused that there was scuffle and altercation and those attending circumstances are (i) the accused had injuries and (ii) the medical expert did stated in his deposition that injuries to the deceased which were injury Nos. 2, 3 and 4 of the Postmortem Note Col.17 were the injuries might have been caused in scuffle.

14. PW-1 Exh. 7 Dr. Hamirbhai Kababhai deposed that on the same day i.e. on 24.11.95 the accused was examined by him and he had incise wound of 2 cms x 1 cm x 1cm size of right thigh lateral portion above knee joint and second incise wound of the size of 1.5 cm x 1 c.m. x 1 c.m. was on right knee joint and both the injuries could be caused by sharp cutting instrument. Now having regard to the evidence of PW-1 Dr.Hamirbhai Kababhai and having regard to extrajudicial confession which is to be considered as a whole and in toto it is also proved beyond doubt that at the time of the incident, altercation and scuffle took place between the accused and deceased and as a result of which accused inflicted

stab wounds to the deceased. Therefore on examining the circumstances on record, we are satisfied that it was the accused who inflicted injuries on the deceased person, as a result of which he died, but at the same time, the circumstances indicating that the accused acted on a grave and sudden provocation also, cannot be ruled out and such possibility is strengthen by the above two circumstances.

15. One more aspect in this respect must find place in arriving at a conclusion of this appeal. True it is that, except extrajudicial confession before PW-2 Manshukhbhai and PW-11 Atubhai, as has been made by the accused, all other witnesses have turned hostile and not supported the prosecution case. It is also true that to bring the prosecution case on record, the prosecution has confronted such hostile witnesses with the prosecution case in shape of asking questions about the statement of the witnesses before the Police and the reply of such witnesses to such questions as recorded by the trail court, may not amount to evidence to come to the conclusion. But the court is still not precluded to have a look at the original prosecution case, upon which charge sheet came to be filed against the accused and the charges came to be framed by the Trial Court against the applicant - accused upon the material which prosecution attempted to prove. Such deposition of witnesses which is in the shape of contradictions of police statement brought on record by the prosecution with the permission of the court to cross-examine its own witness, though cannot be termed as evidence of the case or cannot be relied upon either in the favour of the prosecution or against the accused but may be looked into by the court for the purpose of ascertaining what was the prosecution case and more particularly for deciding the genesis of the incident which except extra judicial confession of the accused is not available otherwise. Where in a case, the FIR was lodged by the accused and could not be read in evidence of the prosecution case, the Apex Court in the matter of SHRI MURLI @ DENNY vs.STATE OF RAJASTHAN, reported in AIR 1994 SC 610 looked into such FIR filed by the accused to ascertain the genesis of the incident. When the present case is considered from this aspect, it should be borne in mind that, the prosecution story as originally stands refers to a rape committed by the deceased upon PW-10 Hansaben before she married to the accused and the accused coming to know of this fact was undoubtedly in provocation and in this respect some dialogues as per the prosecution case took place between the accused and the deceased. This fact is corroborating the conclusion that the act of the accused which is

culpable was the result of sudden quarrel, grave provocation and a heat of passion.

16. In view of the above, when we consider the circumstances that in extrajudicial confession, the accused also stated about altercation and scuffle, the evidence of medical expert stated that accused had also injuries and injuries nos. 2, 3 and 4 inflicted on the person of the deceased may be the result of the scuffle and the genesis of the prosecution case, there cannot be any other conclusion except that the act of accused is squarely covered by Exception-4 of Section 300 of the IPC. We do not find premeditation on the part of the accused while he went to the house of the deceased. On the contrary, we clearly find a sudden fight between the accused and the deceased and the act committed in the heat of passion upon a sudden quarrel between the accused and the deceased. There is clear cut statement of the accused in extrajudicial confession that on account of Rs.300/- there were altercations between the accused and the deceased and with the background of the facts of the prosecution case, the inescapable conclusion from these circumstances would be as sudden fight between two took place, and in the heat of passion, the accused appellant inflicted knife blows, which was only a penknife to the deceased and also received injuries. When PW-1 Hamirbhai Kababhai, Medical Officer stated that injury No.1 a stab wound on left side chest was fatal and other injuries No. 2, 3 and 4 may be result of scuffle, and having regard to the circumstances of the case as discussed, it is clear that it cannot be said that the accused - appellant had taken any undue advantage or had acted in a cruel or unusual manner. The learned Trail Judge failed to appreciate this important aspect of the matter. The net result of this discussion is that the accused appellant cannot be held guilty for the offence under Section 302 of the Indian Penal Code but the act is covered by Exception 4 of Section 300 IPC and, therefore, since the injury caused to the deceased were with intention, falls within the Ist part of Section 304 of the Indian Penal Code.

17. When we have found the appellant - accused guilty for the offence under Section 304 Part-I of the IPC, the next question is what should be the commensurating sentence, which may be awarded to the appellant accused. We have heard learned Advocate Shri N.D.Nanavati in this respect. We have gone through the record and proceedings of the Trail Court especially reply of the accused in

this respect and considering all aspects, we find it proper that the accused - appellant be sentenced for the imprisonment of 10 years RI for the offence proved against him under Section 304 Part-I of the IPC and to pay fine of Rs.200/- in default to further undergo RI for 7 days.

18. In the result, the Appeal is partly allowed to the extent only that the judgment and order dated 15.2.97 of the learned Sessions Judge, Junagadh, convicting the appellant - accused for the offence under Section 302 of IPC and sentencing him for imprisonment for life is set aside. Instead the accused appellant is found guilty for the lesser offence under Section 304 Part-I of the IPC and accordingly we convict the accused - appellant for the offence under Section 304 Part-I and sentence him for the imprisonment of 10 years RI and to pay fine of Rs. 200/- in default to further undergo RI for 7 days.

(B.J.Shethna, J.)

(J.R. Vora, J.)

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